STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

v

PATRICK STOUTENBURG,

Defendant-Appellant,

and

JAMES DIMITRIJEVSKI,

Defendant.

UNPUBLISHED
September 3, 2009

No. 286106
Washtenaw Circuit Court
LC No. 07-000665-CK

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

v

JAMES DIMITRIJEVSKI,

Defendant-Appellant,

and

PATRICK STOUTENBURG,

Defendant.

No. 286231
Washtenaw Circuit Court
LC No. 07-000665-CK

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right the trial court's order granting summary disposition in favor of plaintiff, Liberty Mutual. We affirm.

I. Facts and Procedure

The facts of this case are largely undisputed. On the evening of January 8, 2006, defendant Patrick Stoutenburg and Sandra Nash dined at Xochimilcos Mexican Restaurant in Detroit. There, Stoutenburg and Nash ate and consumed approximately three to four margaritas each, in addition to imbibing alcoholic beverages prior to arriving at Xochimilcos. During dinner, Nash told Stoutenburg that her ex-husband, defendant James Dimitrijevski, had physically abused her in the past. Nash also showed Stoutenburg the marks left on her skin from the abuse.

Following dinner, Stoutenburg and Nash returned to Stoutenburg's home, where Dimitrijevski was visiting his girlfriend, Debbie Rolander. There, Stoutenburg initiated an argument with Dimitrijevski, apparently over his past treatment of Nash. A verbal altercation ensued on Stoutenburg's porch. Eventually, Dimitrijevski, who is much larger than Stoutenburg, grabbed Stoutenburg by the throat, pushed him against a wall, and shoved him into a chair.[1] Stoutenburg then ordered Dimitrijevski and Rolander to leave his house, and when Dimitrijevski refused, Stoutenburg replied, "[Y]ou [expletive] with the wrong person, I'm going to get my gun." Stoutenburg went to his bedroom, retrieved a gun owned by his brother, and returned to the porch holding a rifle pointed at the ground. The gun discharged and a bullet ricocheted off the floor and stuck Dimitrijevski in the ankle. Following the shooting, the police were contacted, and Stoutenburg was arrested for felonious assault. Afterward, police discovered eight guns in Stoutenburg's home and vehicle, all of which were unloaded.

Stoutenburg pleaded guilty to intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b, and discharge of a firearm while under the influence of intoxicants causing serious impairment of a bodily function, MCL 750.237(3). Dimitrijevski then filed suit against Stoutenburg for injuries sustained as a result of the shooting, and Stoutenburg in turn filed an indemnification claim with his insurer, Liberty Mutual. Liberty Mutual subsequently initiated the instant declaratory action claiming it had no duty to defend or indemnify Stoutenburg in Dimitrijevski's suit because the shooting was not an "occurrence" under Stoutenburg's homeowners policy, and ultimately filed a motion for summary disposition on this ground, which the trial court granted. This appeal ensued.

II. Analysis

We review a trial court's order granting a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits,

[1] There were conflicting reports regarding whether Stoutenburg threw a knife at Dimitrijevski.

pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald, supra* at 332.

"An insurance policy is construed in accordance with the well-settled principles of contract construction." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). In the event of ambiguous terms in an insurance policy, the court will resolve the ambiguity in favor of the insured, but where no ambiguity exists, the court will enforce the terms as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

Defendants argue that the shooting was an "occurrence" as defined by Stoutenburg's insurance policy. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in . . . bodily injury." The term "accident" is not defined in the policy. "However, using the common meaning of the term, [our Supreme Court has] repeatedly stated that 'an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" *Id.* at 114, quoting *Arco Industries Corp v American Motors Ins Co*, 448 Mich 385, 404-405; 531 NW2d 168 (1995). *Masters* further instructs that the focus of the "accident," which is evaluated from the standpoint of the insured, should be on "both the 'injury-causing *act* or *event* and its relation to the resulting property damage or personal injury.'" *Masters, supra* at 115, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624; 527 NW2d 760 (1994) (Cavanagh, C.J., with Boyle and Griffin, JJ., concurring) (emphasis in original), overruled in part on other grounds by *Masters, supra* at 117 n 8. Finally, the insured does not need to act unintentionally for an act to qualify as an accident, and thus an "occurrence" as defined by the insured's insurance policy. *Masters, supra* at 115.

To determine if an act shall be construed as an "accident" for purposes of insurance coverage, the Supreme Court has adopted the following two-part test: (1) it must be determined whether the insured acted intentionally and if so, (2) it must be determined whether "the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." *Masters, supra* at 115 (quotation and citation omitted); see also *Allstate Ins Co v McCarn* (*After Remand*) (*McCarn II*), 471 Mich 283, 289-290; 683 NW2d 656 (2004). The first prong involves a subjective inquiry, i.e., whether Stoutenburg intended to fire the gun; the second prong involves an objective inquiry, i.e., whether a reasonable person in Stoutenburg's position would intend or expect harm to result to Dimitrijevski. *McCarn II, supra* at 290.

Turning to the first prong of the *Masters* test, the trial court found that Stoutenburg's guilty plea-based conviction to intentional discharge of a firearm in a dwelling was sufficient to show that Stoutenburg intentionally fired the gun. This conclusion effectively precluded consideration of Stoutenburg's testimony that he did not realize the gun was loaded and that it accidentally fired. While it is undisputed that a guilty plea is an admission of guilt that may be used as substantive evidence to prove any fact essential to the criminal act to which a defendant pleaded guilty, MRE 803(22); *Lichon v American Universal Ins Co*, 435 Mich 408, 417-419; 459 NW2d 288 (1990), at issue here is whether a guilty plea-based conviction is conclusive in

subsequent civil litigation of the facts on which the conviction was based (i.e., whether Stoutenburg's guilty plea establishes that he intentionally fired the gun).

The Supreme Court has adopted the doctrine of judicial estoppel to prevent one party from playing "fast and loose with the legal system" by asserting an inconsistent position in subsequent litigation. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). In applying judicial estoppel, the court must first determine if the party asserted a successful position in one proceeding, and second, if that party asserted a "wholly inconsistent" position in a subsequent proceeding. *Id*. Judicial estoppel is evaluated according to the prior success model, which provides that, "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Id.* at 510.

The Restatement (Second) of Judgments' treatment of judicial estoppel in the context of a guilty plea is instructive:

> A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing the elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because the issue has not actually been litigated, but is a matter of the law of evidence beyond the scope of this Restatement. [Restatement Judgments, 2d, § 85, comment b, p 396.]

Geoffrey C. Hazard, Jr., who served as one of the reporters for the Restatement, explains this estoppel notion as follows:

> In a pleading system where matters are "distinctly put in issue," it makes sense to say that if a proposition is clearly asserted, and if a party is called upon solemnly to admit or deny the proposition, and if the stakes are high enough to assure that the party is serious in dealing with the issue, and if the party then admits or fails to deny the proposition, then he ought to be estopped from controverting it on some other occasion, particularly if that other occasion involves essentially the same transaction. The clearest case for such an estoppel is where a defendant pleads guilty to a substantial criminal charge and then seeks in civil litigation concerning the same transaction to assert that he did not commit the criminal act. [Hazard, *Revisiting the second restatement of judgments: issue preclusion and related problems*, 66 Cornell L Rev 564, 577-78 (1981).]

Utilizing the same standard as used in Michigan, numerous courts have found judicial estoppel appropriate when a party seeks to assert a claim inconsistent with their prior guilty plea. See e.g., *Schultz v Wellman*, 717 F2d 301, 307 (CA 6, 1983) (the plaintiff's prior guilty plea "foreclosed" his subsequent civil claim because he was denied the opportunity to contest an allegedly illegal search and seizure); *Thore v Howe*, 466 F3d 173, 183-184 (CA 1, 2006) (following a plea of guilty at his criminal trial, defendant was estopped from claiming excessive force and assault and battery against the police in a civil trial because he was unable to assert a reasonable justification for the change in position); *Bradford v Wiggins*, 516 F3d 1189, 1195 (CA 10, 2008) (a party's admission and court's acceptance of defendant's plea in a criminal trial judicially estopped him from claiming false arrest in subsequent litigation).

In the case at hand, judicial estoppel precludes Stoutenburg from asserting that the firing of the gun was accidental. Here, Stoutenburg was convicted by guilty plea of intentional discharge of a firearm at a dwelling. In doing so, the intent element of the offense was satisfied and necessarily accepted as true, as required by the prior success model – specifically that the defendant "intentionally" discharged a firearm at a dwelling. *People v Henry*, 239 Mich App 140, 144; 607 NW2d 767 (1999).[2] This element is identical to the first prong of the *Masters* test at issue here. For Stoutenburg to assert at this point that he did not intentionally fire the gun because he was unaware the gun was loaded is "wholly inconsistent" with his guilty plea asserted in the prior proceeding.[3] Furthermore, given his conviction by guilty plea, Stoutenburg's position was successfully asserted in the prior criminal proceeding.[4]

While Stoutenburg points out that a judge need not actually decide that a jury would convict a defendant to accept a guilty plea, *People v Haack*, 396 Mich 367, 378; 240 NW2d 704 (1976), and that he contested his intent at the guilty plea hearing, "[a] guilty plea is more than an admission of conduct; it is a conviction." *People v Saffold*, 465 Mich 268, 292 n 7; 631 NW2d 320 (2001), quoting *Boykin v Alabama*, 395 US 238, 242; 89 S Ct 1709; 23 L Ed 2d 274 (1969). Indeed, were Stoutenburg and Dimitrijevski to ultimately prevail in this declaratory action, the resolution of the first prong of the *Masters* test would lead to a ruling inconsistent with the judgment of his conviction – a danger the doctrine of judicial estoppel expressly seeks to avoid. *Paschke*, *supra* at 510 n 4. While Stoutenburg claims that he maintained during his criminal proceedings that he was unaware the gun was loaded, the validity of his conviction is not at issue here. In any event, Stoutenburg "can hardly be heard now to say that he was unjustly convicted or that he was merely trifling with the course of justice when he pleaded guilty." *Bower v O'Hara*, 759 F2d 1117, 1130 (CA 3, 1985) (Sloviter, J., dissenting), quoting *United States v Bower*, 95 F Supp 19, 22 (ED Tenn, 1951). Given this, Stoutenburg cannot now assert he did not

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[2] Stoutenburg places much emphasis on the fact that intentional discharge of a firearm in a dwelling is a general intent crime. *Henry*, *supra* at 145. However, "[t]he intent to do the physical act, that is, the intent to discharge a firearm in an occupied structure, satisfies the intent element of the statute. The statute does not require any criminal intent beyond the act done, such as the intent to injure a person or damage property by discharging a firearm. All that is required is proof that defendant purposefully or voluntarily, in other words, 'intentionally,' discharged a firearm in an occupied structure." *Id.* at 144, citing *People v Lardie*, 452 Mich 231, 240; 551 NW2d 656 (1996), overruled in part on other grounds by *People v Large*, 473 Mich 418; 703 NW2d 774 (2005). Stoutenburg reasons that he could have been found guilty for the same crime if he fired his gun in an empty bedroom. However, all that is necessary to satisfy the first prong of the *Masters* test is that Stoutenburg intentionally discharged his gun, not that he intended the consequence.

[3] It should be pointed out that although Dimitrijevski argues he was not party to the criminal proceedings, this is irrelevant because judicial estoppel has no requirement regarding different parties' prior involvement. *Lichon*, *supra* at 416.

[4] One may initially question whether someone is successfully asserting anything when pleading guilty to a crime. However, normally in guilty pleas the prosecution drops other charges in consideration for the guilty plea.

know the gun was loaded. Thus, no genuine issue of material fact exists on the first prong of *Masters*.

Turning to the second prong of the *Masters* test, defendants rely heavily on *Allstate Insurance Co v McCarn*, to argue that a reasonable person in Stoutenburg's position would not have expected or intended the consequential harm suffered by Dimitrijevski. *Allstate Insurance Co v McCarn* (*McCarn I)*, 466 Mich 277; 645 NW2d 20 (2002).

In *McCarn* the defendant shot and killed his friend when he mistakenly believed the gun was unloaded. *Id*. at 279-280, 285. As a result of the shooting, the defendant pleaded *nolo contendere* to manslaughter. *Id*. at 288 n 7. When the deceased's estate subsequently brought suit against the defendant for the death of their son, the defendant filed an indemnification claim with his insurer. *Id.* at 279-280. The insurer moved for declaratory judgment arguing the shooting did not qualify as an "occurrence" as defined by his homeowners policy. *Id*. The trial court found that even though the defendant intentionally pulled the trigger, his subjective belief that the gun was unloaded qualified the shooting as an "occurrence." *Id.* at 290-291. On appeal, this Court reversed, holding that the defendant's "intentional actions created a direct risk of harm that preclude[d] coverage." *Id*. at 280. However, our Supreme Court determined that the shooting was accidental and thus an "occurrence" because even though the first prong of the *Masters* test was satisfied in that the defendant acted intentionally, there was no reasonable expectation of harm because the shooter believed that the gun was unloaded. *Id.* at 290-291.

The instant case differs from *McCarn* in two key respects. First, in *McCarn*, the defendant pleaded *nolo contendere*, while Stoutenburg pleaded guilty to intentional discharge of a firearm at a dwelling or occupied structure. Second, in *McCarn*, the Court found that the defendant intentionally pulled the trigger of the gun, *id*. at 290-291, while Stoutenburg pleaded guilty to intentional discharge of a firearm. Although it is possible to pull a trigger and not anticipate a bullet exiting the chamber as in *McCarn*, by definition the offense of intentional *discharge* of a firearm means the actor necessarily intended to fire a gun and not merely pull the trigger. *Henry, supra* at 144-145. The intent to commit this act has already been resolved in the analysis of the first prong of the *Masters* test. Thus, *McCarn* is of no avail to the defendants.

It is also worth noting that the *McCarn* Court distinguished its factual scenario from *Nabozny v Burkhardt*, 461 Mich 471, 480-481; 606 NW2d 639 (2000), and *Masters*, *supra* – two cases in which the insureds' actions were not deemed an "occurrence" under the insurance policy – based on the reasoning that the insureds in *Nabozny* and *Masters* intended the consequences of their actions. *McCarn I, supra* at 290. In light of Stoutenburg's intentional discharge of a firearm conviction, however, the case currently before us is in line with the reasoning of both *Nabozny* and *Masters*.

In *Nabozny, supra* at 480-481, our Supreme Court determined that an "accident," and thus an "occurrence," did not occur when the insured intentionally tripped Nabozny to the ground and Nabozny sustained a broken ankle as a result. Although the insured did not intend to break Nabozny's ankle, the Court ruled that the insured "reasonably should have expected the consequences of his acts because of the direct risk of harm created." *Id*. at 481. Similarly, in *Masters*, the Court found that the insured should have reasonably expected that after setting fire to a building, damage would be caused to a neighboring building, irrespective of the fact that

"the harm that resulted . . . was different from or exceeded the harm intended . . . ." *Masters*, *supra* at 116.

Given the circumstances here, a reasonable person in Stoutenburg's position would have expected the consequences of his actions – namely, that firing a gun near another individual's feet in a small, enclosed room would create a substantial risk that an injury may result. As the trial court succinctly explained:

> Stoutenburg fired a gun in close quarters with other people in the room. Irrespective of whether he aimed the gun at another or pointed it elsewhere, he should have reasonably expected that when the gun went off the bullet could have ricocheted off the floor, as it did, or the wall, or a piece of furniture, and struck another individual.

Indeed, the likelihood of causing an injury from firing a gun in this manner is higher than the likelihood of causing an injury after tripping someone in a fight, as in *Nabozny*. Moreover, firing a gun is an inherently dangerous activity – much like the act of setting a fire to a building as in *Masters*. Thus, there is no genuine issue of material fact that Stoutenburg should have reasonably expected the harm resulting from firing a gun at Dimitrijevski's feet. The trial court did not err in finding Stoutenburg's actions failed to constitute an "occurrence" as defined in his insurance policy.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray